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BLINDED BY THE LIGHT: THE THIRD CIRCUIT CURTAILS THE INDEPENDENT *RICCI* DEFENSE IN *NAACP v. NORTH HUDSON REGIONAL FIRE & RESCUE*

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I. DEFINING THE CONTOURS OF RACE IN THE AMERICAN WORKPLACE: IS IT STILL BLACK AND WHITE?

"Prejudice is a burden which confuses the past, threatens the future, and renders the present inaccessible."[1] The statistics are telling.[2] Not only does the median black worker earn 20% less than the median white worker on a weekly basis, but only 2.8% of this country's chief executives are black, and black workers are almost twice as likely as white workers to be unemployed.[3]

While private employers certainly contributed to this racial disparity, public employers are also responsible.[4] Congress recognized several decades ago that "employment discrimination in State and local governments is more pervasive than in the private sector."[5] Public employers often made personnel decisions based on "criteria unrelated to job performance," which "entrench[ed]

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1. MAYA ANGELOU, ALL GOD'S CHILDREN NEED TRAVELING SHOES (1969), *reprinted in* THE COLLECTED AUTOBIOGRAPHIES OF MAYA ANGELOU 881, 1009 (2004).

2. For a discussion of employment statistics in the United States, see *infra* note 3 and accompanying text.

3. *See* U.S BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 1032, LABOR FORCE CHARACTERISTICS BY RACE AND ETHNICITY, 2010, at 2 (2011), *available at* http://www.bls.gov/cps/cpsrace2010.pdf (stating that unemployment rate is 16% for blacks, 12.5% for Hispanics, 8.7% for whites, and 7.5% for Asians); U.S BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, REPORT 1031, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2010, at 59 (2011), *available at* http://www.bls.gov/cps/cpswom2010.pdf (listing median weekly earnings for blacks and whites as $611 and $765, respectively); U.S BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HOUSEHOLD DATA ANNUAL AVERAGES: CPS TABLE 11—EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY 14 (2011), *available at* http://www.bls.gov/cps/cpsaat11.pdf (reporting that only 2.8% of chief executives are black, 3.2% are Asian, and 4.8% are Hispanic); *see also* Akilah Johnson, *Fears Raised over Future of Minority Workforce*, BOS. GLOBE, Dec. 4, 2010, at 1 (suggesting that "[u]nless policy makers, business leaders, and community-based organizations collaborate on ways to prepare them, . . . Boston will have a labor pool of unemployed, underemployed, or unemployable adults"); *Racial Disparities Persist in Work Force*, RICHMOND TIMES-DISPATCH, Apr. 28, 2009, http://www2.timesdispatch.com/business/2009/apr/28/b-race28_20090427-211417-ar-45046/ (voicing concerns about future generations).

4. For a discussion of past instances of discrimination among public employers, see *infra* notes 5-6 and accompanying text.

5. *See* H.R. REP. NO. 92-238, at 15 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2146 (detailing prevalence of discrimination in public sector). Six of the seven areas studied by the report had an overwhelming black population, yet many of the white-collar jobs were inaccessible to minorities. *See id.* (recognizing lack of ability for minorities to progress to managerial levels).

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preexisting racial hierarchies."[6] These observations, among others, prompted Title VII of the Civil Rights Act (Title VII), which aimed to eliminate racial considerations from employment decisions.[7] A recent Third Circuit decision pitted two Title VII discrimination theories against each other, and will force municipalities to reassess racial policies in their hiring and promotional practices.[8]

The purpose of Title VII is to create a workplace free of discrimination, where race is not a barrier to opportunity.[9] The statute originally only prohibited deliberate discrimination (disparate treatment), which covered intentionally discriminatory actions and procedures by employers against members of a protected class.[10] Employers circumvented this by creating preconditions for employment that, while not facially discriminatory, effectively precluded minorities from gaining employment.[11] In response, the Supreme Court proscribed

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6. *See* 118 CONG. REC. 1817 (1972) (noting that hiring decisions were often made based on nepotism or political patronage instead of job-related criteria); Ricci v. DeStefano, 129 S. Ct. 2658, 2691-92 (2009) (Ginsburg, J., dissenting) (explaining that these employment practices maintained status quo of de facto segregation).

7. For a discussion of the goals behind Title VII, see *infra* note 9 and accompanying text.

8. For a discussion of the significance of the Third Circuit's decision on litigation strategies in Title VII employment discrimination cases, see *infra* notes 113-28 and accompanying text.

9. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1071-72 (listing creation of appropriate remedies for intentional discrimination and harassment in employment setting as purposes for Title VII); *Ricci*, 129 S. Ct. at 2674 (explaining purpose of Title VII as creating workplace where race is not barrier to opportunity); Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971) ("'[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.'" (quoting 110 CONG. REC. 7247 (1964))).

10. Section 703(a) of Title VII provides, in relevant part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006); *see also* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (explaining five requirements plaintiff must satisfy in establishing prima facie case of racial discrimination under disparate treatment theory). *McDonnell* requires a plaintiff to show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of [the plaintiff's] qualifications.

Id. at 802. *See generally* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95, 104-05 (2006) (laying out requirements and burdens of proof for disparate treatment claims).

11. *See Griggs*, 401 U.S. at 429-30 (explaining Title VII's purpose as removing past barriers to minority employment and achieving equality of employment opportunities). The Court further noted that "[u]nder the Act, practices, procedures, or tests neutral on their face,

facially neutral requirements to discriminatory actions that were "fair in form but discriminatory in operation" (disparate impact), which Congress codified in the 1991 amendments to Title VII.[12]

But what happens when two different racial groups bring competing disparate treatment and disparate impact claims seeking to compel an employer to take mutually exclusive actions—one threatening to sue if an employer takes a given action and the other threatening to sue if the employer does not take that same action?[13] Should one claim trump the other?[14] In *Ricci v. DeStefano*,[15] the first case to address this issue, the Supreme Court articulated a limited defense against a disparate treatment claim where there was a "strong basis in evidence" to believe that not taking the intentionally discriminatory action would result in a disparate impact claim.[16]

Consider the reverse scenario: Is a requirement that causes a disparate impact permissible if the employer can show a strong basis in evidence that a disparate treatment suit will follow if it does not enforce that requirement?[17] In August of 2011, the Second Circuit confronted this issue but distinguished it from *Ricci* to avoid applying the new defense.[18] This evolving issue arose a few months later in the Third Circuit, presenting another pivotal test for the fledgling *Ricci* defense.[19] In a case of first impression within the Third Circuit,

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and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 430. Using this standard, the Court found that the employment qualification requirements in that case of a high school degree and a qualifying score on professional aptitude tests created a disparate impact. *See id.* at 431-36 (providing how requirements create disparate impact).

12. Section 703(k) of Title VII states:

> (1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if—
>
> > (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or
> >
> > (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

42 U.S.C. § 2000e-2(k) (codifying disparate impact analysis developed in *Griggs*); *see also Griggs*, 401 U.S. at 431 (creating disparate impact theory and providing rationale for barring facially neutral requirements that nonetheless disparately impacted minorities).

13. *See Ricci*, 129 S. Ct. at 2664 (presenting case with factual background analogous to hypothetical scenario).

14. *See* Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181, 2205 (2010) (questioning whether, and under what circumstances, disparate impact liability may trump disparate treatment liability, and vice versa).

15. 129 S. Ct. 2658 (2009).

16. *See id.* at 2677 (clarifying analysis and creating "strong basis in evidence" standard for permitting disparate treatment in light of threatened disparate impact claim).

17. *See* Seiner & Gutman, *supra* note 14, at 2205 (noting that *Ricci*'s holding may indicate that Title VII is symmetric). For a further analysis of the interplay of disparate treatment and disparate impact claims, see *infra* notes 100-09 and accompanying text.

18. *See* Briscoe v. City of New Haven, 654 F.3d 200, 209-10 (2d Cir. 2011) (distinguishing holding in *Ricci* and refusing to extend its application).

19. For a discussion of the Third Circuit's analysis of the breadth of the *Ricci* defense,

the *NAACP v. North Hudson Regional Fire & Rescue*[20] court declined to extend the independent defense provided by *Ricci* beyond the facts of that case.[21]

The Third Circuit's decision in *North Hudson* is consistent with the Second Circuit's approach and represents its willingness to reinforce Title VII's purpose by narrowly interpreting the defenses to liability.[22] Part II of this Casebrief reviews the Supreme Court's development of Title VII jurisprudence with a particular focus on the disparate impact analysis and how competing Title VII discrimination claims should be adjudicated.[23] This section also discusses how the Second Circuit addressed a similar issue to that faced in *North Hudson*, and describes the Third Circuit's approach to municipal residency requirements—the employment practice giving rise to the disparate impact claim in *North Hudson*.[24] Part III analyzes the Third Circuit's reasoning in *North Hudson*, its narrow interpretation of the independent *Ricci* defense, and its treatment of residency requirements.[25] Part IV provides key insights from *North Hudson*'s holding and offers guidance to practitioners on how the case will affect future Title VII cases in the Third Circuit.[26] Finally, Part V summarizes *North Hudson*'s holding and potential impact.[27]

II. COLORING WITHIN THE LINES: A BACKGROUND ON TITLE VII'S THEORIES OF LIABILITY AND AN OVERVIEW OF RESIDENCY REQUIREMENTS

Title VII has evolved since its creation to cover both intentional and facially neutral discriminatory practices.[28] In *Ricci*, these two theories of liability

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see *infra* notes 80-109 and accompanying text.

20. 665 F.3d 464 (3d Cir. 2011).

21. *See id.* at 484 (distinguishing *Ricci* and declining to permit practice that results in disparate impact on grounds that disparate treatment suit was threatened); *see also* Jerry DeMarco, *NHRFR Discriminates Against Blacks in Hiring, Federal Panel Finds*, CLIFFVIEW PILOT, (Dec. 13, 2011, 5:15 PM), http://www.cliffviewpilot.com/hudson/3139-nhrfr-discriminates-against-blacks-in-hiring-federal-panel-finds (noting key facts that Third Circuit used in rendering its decision); Dyanna Quizon, *Another Firefighter Discrimination Case: North Hudson Not New Haven*, FINDLAW: U.S. THIRD CIRCUIT BLOG (Dec. 15, 2011, 3:02 PM), http://blogs.findlaw.com/third_circuit/2011/12/another-firefighter-discrimination-case-north-hudson-not-new-haven.html (explaining Third Circuit's holding).

22. For a discussion of the Third Circuit's narrow interpretation of possible defenses to Title VII employment discrimination actions and how this is consistent with the purposes of Title VII, see *infra* notes 110-28 and accompanying text.

23. For a discussion of the Supreme Court precedent on Title VII discrimination claims, see *infra* notes 28-55 and accompanying text.

24. For a discussion of the Second Circuit's analysis of the *Ricci* defense and the Third Circuit's jurisprudence on municipal residency requirements, see *infra* notes 56-79 and accompanying text.

25. For a discussion of the Third Circuit's decision in *North Hudson*, see *infra* notes 80-109 and accompanying text.

26. For a discussion of disparate treatment and disparate impact jurisprudence in the Third Circuit and guidance to practitioners litigating these issues in the future, see *infra* notes 110-40 and accompanying text.

27. For a discussion of the bleak prospects for defendants in employment discrimination cases brought under Title VII, see *infra* notes 142-51 and accompanying text.

28. For a review of Title VII and the creation of the disparate impact theory in response to persistent employment discrimination, see *infra* notes 32-55 and accompanying text.

were alleged in a competing manner against the same employer, and the Supreme Court created a strong basis in evidence test to balance the theories.[29] The Second Circuit addressed a similar issue but found the test unnecessary because it distinguished *Ricci*.[30] Of crucial importance to *North Hudson* was the Third Circuit's analysis of residency requirements that created a situation in which the *Ricci* defense might apply.[31]

A. *The Birth of the Disparate Impact Theory: Setting the Stage for a Clash with the Disparate Treatment Theory*

The disparate treatment theory, which usually applies to subjective employment standards, arises when an employer intentionally treats a group of people less favorably on the basis of race, color, religion, sex, or national origin.[32] This form of discrimination was barred in the original Civil Rights Act of 1964.[33] Unfortunately, employers bypassed this by instituting requirements that, while not facially discriminatory, had the invidious effect of maintaining the status quo of racial discrimination.[34] To stop this, the Supreme Court created the disparate impact theory in *Griggs v. Duke Power Co.*,[35] which allowed plaintiffs to establish discrimination without showing a discriminatory intent.[36] The disparate impact theory was later codified in the 1991

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29. For an analysis of the interplay between disparate treatment and disparate impact claims, see *infra* notes 46-55 and accompanying text.

30. For a discussion of the Second Circuit's approach to conflicting disparate treatment and disparate impact claims, see *infra* notes 56-67 and accompanying text.

31. For a detailed analysis of the Third Circuit's approach to residency requirements in the context of municipal hiring, see *infra* notes 68-79 and accompanying text.

32. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (explaining that proof of discriminatory intent is crucial for establishing disparate treatment claim); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265-66 (1977) (suggesting that discriminatory motive may sometimes be inferred from differences in treatment).

33. *See* Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (2006) (prohibiting intentional discrimination on basis of certain immutable characteristics).

34. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 426 (1971) (noting that test requirements disqualified African Americans disproportionately more than whites, and that jobs in question were filled by white employees as part of longstanding practice of giving preference to whites); *see also* Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1482 (1996) (explaining that elimination of intentional discrimination alone will prove insufficient to provide equal opportunities for all races because overt discrimination is not only form of discrimination). Professor Spiropoulos identifies three subtler forms of discrimination that must be addressed in addition to intentional discrimination: pretextual, statistical, and unconscious discrimination. Spiropolous, *supra*, at 1482. Pretextual discrimination occurs when those who intend to discriminate against minorities mask their manifestations by instituting job-neutral criteria that disproportionately disqualify these groups. *See id.* (defining pretextual discrimination).

35. 401 U.S. 424 (1971).

36. *See id.* at 429-30 (identifying new disparate impact doctrine). The Duke Power Company had openly discriminated on the basis of race prior to the passage of the Civil Rights Act of 1964. *See id.* at 426-27 (describing district court's findings). In response to the Civil Rights Act's passage, Duke Power required a high school diploma and a passing score on certain standardized tests to work in the more desirable departments of the company. *See id.* at 427 (noting that Duke Power had five departments, but that African Americans were

amendments to the Civil Rights Act.[37] While disparate impact claims provide an alternative method to combat discrimination, scholars have noted that they can be more difficult to prove than disparate treatment cases.[38]

Griggs and its progeny have established a three-prong test for analyzing disparate impact claims.[39] Initially, the plaintiff bears the burden of establishing a prima facie case by showing that the specific facially neutral employment practice at issue is causing a significant discriminatory effect.[40] In most cases, this can be demonstrated by showing substantial statistical disparities between the employer's work force and the relevant labor market.[41] However, an employer may not skirt liability simply because the practices did not actually result in a significant racial disparity.[42]

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only permitted to work in Labor Department, where highest paying job paid less than lowest paying job in other four departments). While requiring a passing score on standardized tests was not facially discriminatory, the court found that it operated to freeze the status quo of prior discriminatory employment practices and invalidated the requirements under the new disparate impact theory. *See id.* at 430-35 (stating Court's holding); *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 987 (1988) ("[T]he necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination.").

37. *See* 42 U.S.C. § 2000e-2(k) (prohibiting employment practices that cause disparate impact on minorities, regardless of whether employer had intention to discriminate).

38. *See, e.g.*, Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 734 (2006) (arguing that disparate impact claims require higher standard of proof than disparate treatment claims, which is particularly significant "given that employment discrimination claims themselves are notoriously difficult to prove").

39. *See Watson*, 487 U.S. at 995 (providing prongs for disparate impact analysis); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (same); *see also Griggs*, 401 U.S. at 429-33 (laying foundation for disparate impact claims). *See generally* Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 393-95 (1996) (discussing required elements for establishing disparate impact).

40. *See* § 2000e-2(k)(1)(A)(i) (imposing requirement on plaintiffs to "demonstrate[] that a respondent uses a *particular* employment practice that causes a disparate impact" (emphasis added)); *Watson*, 487 U.S. at 994 (declaring that plaintiffs are "responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities"); *see also* Connecticut v. Teal, 457 U.S. 440, 446 (1982) (illustrating that plaintiffs must show that "facially neutral employment practice had a significantly discriminatory impact"); *Griggs*, 401 U.S. at 431-32 (prohibiting "not only overt discrimination but also practices that are fair in form, but discriminatory in operation").

41. *See Watson*, 487 U.S. at 994-95 (requiring plaintiffs to offer "statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants . . . because of their membership in a protected group" and that disparities "must be sufficiently substantial that they raise such an inference of causation"); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 (1977) (stating that statistical comparison must be between racial composition of employer's workforce and that of relevant labor market). For example, significant disparities between the racial composition of a particular school's teaching staff and the racial composition of the qualified public school teacher population in the local labor market could establish the first prong of a disparate impact claim. *See Hazelwood Sch. Dist.*, 433 U.S. at 308 (offering example of relevant statistical comparison). A comparison between the racial composition of the school's teaching staff and the racial composition of the surrounding town, however, would not have evidentiary value because the general population does not necessarily represent the relevant applicant pool. *See id.* (noting ineffective comparison for purposes of disparate impact claim).

42. *See Teal*, 457 U.S. at 451 ("The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual re-

Upon a plaintiff's successful showing of a prima facie case, the burden shifts to the employer to prove that the challenged requirement or practice has a "manifest relationship to the employment in question" and that it is consistent with a business necessity.[43] Commonsense assertions of business necessity are insufficient, and courts have instead required empirical proof relating the hiring criteria to predicted job performance.[44] Finally, even if the employer sustains its burden, the plaintiff may still prevail by offering a legitimate, less discriminatory alternative.[45]

In 2009, the Supreme Court considered how disparate treatment claims interact with disparate impact claims.[46] In *Ricci*, the city of New Haven offered a promotional exam for firefighters testing the knowledge, skills, and abilities necessary for the promotion.[47] Based on the exam results, no black candidates

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spondents the *opportunity* to compete equally with white workers on the basis of job-related criteria."); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 579 (1978) ("A racially balanced work force cannot immunize an employer from liability for specific acts of discrimination.").

43. *See Teal*, 457 U.S. at 446-47 (emphasizing requirements to establish business necessity defense); *Griggs*, 401 U.S. at 431-32 (forcing employer to show business reason for discrimination and opining that "[t]he touchstone is business necessity. If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."); *see also* Laya Sleiman, Note, *A Duty to Make Reasonable Efforts and a Defense of the Disparate Impact Doctrine in Employment Discrimination Law*, 72 FORDHAM L. REV. 2677, 2684 (2004) (commenting on burden shift after prima face case has been established).

44. *See* Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (rejecting proffered business necessity defense that minimum height and weight requirements for correctional officers "have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance"); *Griggs*, 401 U.S. at 436 (insisting that requirements be "demonstrably a reasonable measure of job performance"). *But see* N.Y.C. Transit Auth. v. Beazer, 440 U.S. 568, 594 (1979) (accepting safety of disabled passengers and efficiency as legitimate business necessity in permitting transit authority to exclude methadone users from employment); Washington v. Davis, 426 U.S. 229, 250-51 (1976) (finding satisfactory business necessity for written test related to success at police training academy, despite fact that it was not necessarily related to actual performance as police officer in field). *See generally* Grover, *supra* note 39, at 389-92 (analyzing business necessity defense and noting that its application varies); Spiropoulos, *supra* note 34, at 1484 (articulating two possible interpretations of business necessity defense).

45. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2673 (2009) (recognizing that "if an employer met its burden by showing that its practice was job-related, the plaintiff was required to show a legitimate alternative that would have resulted in less discrimination"); *Teal*, 457 U.S. at 447 ("[T]he plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination."); *Dothard*, 433 U.S. at 329 (explaining that plaintiff has opportunity to show that different employment practice would achieve employer's legitimate interest but without discriminatory effect); Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) (noting that plaintiff may prevail on disparate impact claim despite proof of legitimate business reason for discriminatory actions).

46. For a discussion of the interplay of disparate treatment and disparate impact claims, see *infra* notes 47-55 and accompanying text.

47. *See Ricci*, 129 S. Ct. at 2665-66 (explaining how New Haven hired independent firm to construct and administer test with special emphasis on ensuring that racial minorities would not be disadvantaged by examination). The firm took painstaking steps to ensure that the examination was fair, including: deliberately oversampling minority firefighters when conducting its job analysis to determine what tasks and abilities were important for promotion, drafting the exam exclusively from a list of sources approved by the New Haven fire chief, writing the test below a tenth grade reading level, providing candidates with the source mate-

were eligible for a promotion, and the city faced competing threats of legal action regarding what to do with the tests.[48] The black firefighters claimed that the exam discriminated against them under a disparate impact theory and demanded that the test results be discarded.[49] Conversely, the white and Hispanic firefighters who scored well enough to be promoted threatened to bring a disparate treatment lawsuit if their promotions were denied based on the exam's racial disparities.[50]

New Haven elected to nullify the exams and the white and Hispanic firefighters brought suit; the district court granted, and the Second Circuit upheld, summary judgment in favor of New Haven.[51] The Supreme Court reversed, over a strong dissenting opinion, finding that the city's decision to disregard the results, by relying on statistics showing that "too many whites and not enough minorities" would have been promoted based on the exam results, was based on race.[52] The Court held that disparate treatment—in this case, refusing to certify the exam on the basis of race—could only be justified if there was a "strong basis in evidence" to believe that not certifying the exam would result in a disparate impact claim.[53] In this instance, a suit from the black firefighters who alleged that the facially neutral exam unfairly discriminated against them represented the disparate impact claim.[54] The Court concluded that New Ha-

rial for the questions, and even indicating the specific chapters from which the questions were drawn. *Id.* at 2665-66.

48. *See id.* at 2670-71 (noting that twenty-five out of forty-three whites, six out of nineteen blacks, and three out of fifteen Hispanics passed the exam). The city held extensive public meetings, complete with expert testimony and raucous behavior from both sides, on whether the test results should stand. *See id.* (explaining context in which debate took place).

49. *See id.* at 2664 (stating legal argument asserted by black firefighters).

50. *See id.* at 2664-66 (discussing threatened legal action from white and Hispanic firefighters); *see generally* Richard A. Epstein, Ricci v. DeStefano*: Getting Back to First Principles of Affirmative Action*, FORBES, June 29, 2009, http://www.forbes.com/2009/06/29/ricci-destefano-new-haven-supreme-court-affirmative-action-opinions-columnists-firefighters.html (critiquing Title VII in general and suggesting that facts of *Ricci* expose Title VII's framework as incapable of properly governing disputes of this kind).

51. *See Ricci*, 129 S. Ct. at 2671 (illustrating procedural history).

52. *See id.* at 2673 (internal quotation marks omitted) (quoting Ricci v. DeStefano, 554 F. Supp. 2d 142, 152 (D. Conn. 2006), *rev'd*, 129 S. Ct. 2658) (pointing out city's motive in nullifying exam results). The dissenters and many scholars, however, strongly disagreed with the majority's conclusion. *See id.* at 2690 (Ginsburg, J., dissenting) ("The Court's order and opinion, I anticipate, will not have staying power."); Allen R. Kamp, Ricci v. DeStefano *and Disparate Treatment: How the Case Makes Title VII and the Equal Protection Clause Unworkable*, 39 CAP. U. L. REV. 1, 2 (2011) (criticizing *Ricci* holding as having potential to "utterly defeat" efforts at ending discrimination); Nancy L. Zisk, *Failing the Test: How* Ricci v. DeStefano *Failed to Clarify Disparate Impact and Disparate Treatment Law*, 34 HAMLINE L. REV. 27, 28 (2011) (asserting that *Ricci* has turned employment discrimination theory on its head).

53. *See Ricci*, 129 S. Ct. at 2677 ("[B]efore an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to a disparate-impact liability if it fails to take the race-conscious, discriminatory action."); *see also* Adam Liptak, *Supreme Court Finds Bias Against White Firefighters*, N.Y. TIMES, June 29, 2009, at A1 (noting that new standard will make it more difficult for employers to discard exam results once tests are given, even if they have negative impact on minority group).

54. *See Ricci*, 129 S. Ct. at 2677 (explaining basis for potential disparate impact claim).

ven failed to satisfy the strong basis in evidence standard and ordered the city to certify the exam results.[55]

B. *Seeing Shades of Grey: The Second Circuit Interprets the* Ricci *Defense*

In *Briscoe v. City of New Haven*,[56] the Second Circuit was squarely presented with the reverse of the situation addressed by the Supreme Court in *Ricci*.[57] The *Briscoe* court had to decide whether a party facing a disparate impact claim could avoid liability by showing, by a strong basis in evidence, that discontinuing the practice would lead to a disparate treatment claim.[58] Briscoe was a black firefighter in the same fire department at issue in *Ricci*.[59] After the *Ricci* decision compelled New Haven to certify the promotional exam results, Briscoe brought suit alleging that those tests caused a disparate impact on black firefighters because of the weight given to the oral and written components.[60] The district court concluded that *Ricci* precluded Briscoe's claim and dismissed his suit, but Briscoe appealed to the Second Circuit.[61]

As a threshold matter, the Second Circuit held that the *Ricci* decision did not preclude Briscoe's claim because he was not a party in that case.[62] The court then analyzed *Ricci* and determined that it did not provide a symmetrical defense.[63] The court reasoned that *Ricci* provided no support for the proposition that requirements that caused a disparate impact were permitted if there was a strong basis in evidence to believe that disparate treatment liability would result from the elimination of those requirements.[64] Unlike disparate impact

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55. *See id.* at 2664 (stating Court's holding); *see also Overview*, *in* [1 Analysis of Federal Law] Empl. Discrimination Coordinator (West) § 19:1 (2012) (explaining that city would only have been liable if examinations were neither job-related nor consistent with its proffered business necessity, or if equally valid but less discriminatory alternatives existed). The Supreme Court found that there was not a strong basis in the evidence to establish that the exam was deficient with respect to either of those qualifications. *See id.* (finding that New Haven failed to justify intentional discrimination against white and Hispanic firefighters under new test).

56. 654 F.3d 200 (2d Cir. 2011).

57. *See id.* at 205 (noting that New Haven advocated for broad, two-way reading of *Ricci*'s defense so that it would shield against liability in current case).

58. For a further discussion of the competing disparate treatment and disparate impact claims in a setting opposite to *Ricci*, see *infra* notes 59-67 and accompanying text.

59. *See Briscoe*, 654 F.3d at 201-02 (detailing factual background of case).

60. *See id.* at 202 (explaining plaintiff's allegation that 40% and 60% weights given to oral and written sections, respectively, were arbitrary, unrelated to job requirements, and contrary to industry norm of 70% for oral and 30% for written). Briscoe scored the highest of any candidate on the oral portion of the exam, but like many of the other black candidates, performed poorly on the written section. *See* Richard Thompson Ford, *Now a Black Firefighter Is Suing New Haven*, SLATE (Oct. 23, 2009, 7:12 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2009/10/now_a_black_firefighter_is_suing_new_haven.html (describing Briscoe as sympathetic plaintiff who was ineligible for promotion based on questionable weighting of exam components).

61. *See Briscoe*, 654 F.3d at 202-04 (providing procedural history of case).

62. *See id.* at 203 (rejecting preclusion argument because Briscoe was not joined as party in prior case).

63. For a discussion of the Second Circuit's analysis regarding the *Ricci* defense, see *infra* notes 64-67 and accompanying text.

64. *See Briscoe*, 654 F.3d at 205-06 (refusing to permit concern over disparate treat-

liability, which punishes accidental discrimination, disparate treatment liability requires intentional actions.[65] Therefore, it is difficult to envision how a party could offer a strong basis in evidence that the party would intentionally discriminate in the future.[66] After holding that disparate treatment and disparate impact claims were not symmetrical for purposes of the *Ricci* defense, the court remanded Briscoe's case for further proceedings.[67]

C. *Where Does the Third Circuit Reside on Residency Requirements?*

The Third Circuit's disparate impact jurisprudence regarding the validity of residency requirements was unsettled prior to the decision in *North Hudson*.[68] In *NAACP v. Town of Harrison*,[69] the Third Circuit invalidated a residency requirement based upon a statistical showing by the plaintiffs that no blacks had ever held a uniformed position with the town.[70] The court stated that it did not matter whether the disparity between the private and municipal workforce was thirty percent or five percent; the fact that no black person had ever been hired

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ment liability to erase liability for disparate impact). First, the court pointed out that *Ricci*'s holding is very narrow and that the city relied on dicta to support its argument. *See id.* at 206-07 (explaining that *Ricci*'s holding is narrower than what New Haven claimed); Thomas S. Marcey, *Affirmative Action In Employment Post* Ricci v. DeStefano, CONSTR. BRIEFINGS, Nov. 2011 (suggesting that district court read favorable portion of *Ricci* opinion out of context from rest of opinion). Moreover, the parameters defining a disparate impact claim were statutory, whereas case law provided most of the contours of a disparate treatment claim. *See Briscoe*, 654 F.3d at 207 (providing reason for distinguishing case from *Ricci*).

65. *See Briscoe*, 654 F.3d at 208 (distinguishing requirements and nature of disparate treatment and disparate impact claims).

66. *See id.* (stating that it is "hard to see how one can adduce a 'strong basis in evidence' that oneself will later act with 'discriminatory intent or motive'" (citation omitted)).

67. *See id.* at 209-10 (reversing district court decision and holding that Briscoe may assert his disparate impact claim); Luther Turmelle, *New Haven Firefighter's Lawsuit Revived by Appeals Court*, NEW HAVEN REGISTER, Aug. 16, 2011, *available at* http://www.nhregister.com/articles/2011/08/16/news/doc4e49cc7e46a8a434230756.txt (announcing that Briscoe has opportunity to prove that, with fairly scored test, he is best candidate for promotion).

68. For a discussion of the Third Circuit's removal of certain residency requirements and approval of others, see *infra* notes 69-79 and accompanying text. The *North Hudson* decision was timely because residency requirements have recently increased due to budget shortfalls in many counties. *See* Ricardo Kaulessar, *Residency Requirements Cause Controversy*, HUDSON REP., Jan. 6, 2009, http://hudsonreporter.com/view/full_story/1211333/article-Residency-requirements-cause-controversy-Bayonne--other-towns-will-force-city-workers-to-live-here- (observing that towns are addressing budget problems by terminating employees who do not comply with residency requirement).

69. 940 F.2d 792 (3d Cir. 1991).

70. *See id.* at 796 (insisting that magnitude of statistical disparity when compared with relevant labor market was irrelevant because black persons represented 0% of Harrison's municipal workforce). The town of Harrison, whose general population was only 0.2% black, used a residency requirement that was challenged on the grounds that it had a disparate impact on blacks. *See id.* at 794-96. Blacks represented 22% of the private labor force in the town of Harrison, and this indicated that black persons were commuting in from other towns to work. *See id.* at 799-800 (suggesting that removing residency requirement would increase employment of blacks in public-sector workforce); *see also* Erika L. Wood, Note, *Surviving Title VII: Defending Municipal Residency Requirements in Minority Communities*, 1 RUTGERS RACE & L. REV. 427, 428-29 (1999) (noting that residency requirements were especially harmful in New Jersey because many towns were segregated by race).

for a municipal job in the town of Harrison established the prima facie case demanded by the first prong of the disparate impact test.[71] The Third Circuit went on to find that Harrison failed the second prong of the test because it did not prove a manifest relationship between the residency requirement and job performance; as a result, the court ordered Harrison to stop using the residency requirement as a factor in its hiring process.[72]

Conversely, in *NAACP v. City of Bayonne*,[73] the Third Circuit backtracked and upheld the validity of a residency requirement because the plaintiff failed to produce compelling statistical evidence linking the disparity to the residency requirement.[74] The City of Bayonne had previously been sued for its racial disparities and had agreed to a settlement that forced the city to suspend its residency requirement for four years.[75] After the four years elapsed, Bayonne attempted to reinstate the requirement and was sued again under a disparate impact theory.[76] During the four years that the residency requirement was suspended, the number of black firefighters did not increase, and the number of black police officers decreased.[77] The Third Circuit held that the statistical disparities between the private and public workforces could not be attributed to the residency requirement because removing the residency requirement did not increase the number of black municipal workers.[78] *Bayonne* lent credibility to the notion that other factors may be causing the racial disparities, and it permitted the defendants to advocate for a stronger showing of causation before removing the residency requirement.[79]

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71. *See Harrison*, 940 F.2d at 797-800 (eliminating other potential causes for disparity). According to the court, the disparity was not attributable to a lack of interest or an unwillingness to commute, as evidenced by the ample means for quick travel between the surrounding county and Harrison and the fact that black workers would seek municipal positions if the residency requirement were removed. *See id.* at 797 (concluding that residency requirement was clear cause of racial disparity between municipal and private workforces in Harrison).

72. *See id.* at 801-05 (rejecting need for rapid responses in emergencies, increased expense of screening applicants, and community loyalty as business justifications). The Third Circuit also noted that there were reasonable alternatives that would achieve the same goals without causing a disparate impact. *See id.* at 804-05 (dismissing Harrison's justifications as insufficient to condone discriminatory effects produced by residency requirement).

73. 134 F.3d 113 (3d Cir. 1998).

74. *See id.* at 117-19 (classifying evidence provided by plaintiff's expert as "speculative" and "possibilities without any evidential basis").

75. *See id.* at 115 (detailing settlement that required city of Bayonne to eliminate its residency requirement and actively recruit black applicants for period of four years).

76. *See id.* (reporting that after four-year term expired, city restored residency requirement and NAACP sued seeking injunctive relief).

77. *See id.* at 115-17 (noting that African American representation in Bayonne police department shrank from 3.4% to 1% during four years in which residency requirement was not in place).

78. *See id.* at 117-21 (rejecting plaintiff's causation argument and noting that plaintiff even conceded at oral argument that New Jersey civil service exam, and not residency requirement, was likely cause of disparity).

79. *See* Brief for Appellant at 20, NAACP v. North Hudson Reg'l Fire & Rescue, 665 F.3d 464 (3d Cir. 2011) (No. 10-3983) (noting that removing residency requirement is not always effective at increasing black representation among workforce).

III. THE THIRD CIRCUIT DISENTANGLES DISPARATE TREATMENT AND DISPARATE IMPACT CLAIMS IN *NAACP V. NORTH HUDSON REGIONAL FIRE & RESCUE*

North Hudson, a consortium of five municipalities in New Jersey, utilized a residency requirement that screened out potential applicants for positions in the North Hudson fire department—a practice used by many other municipalities in the state.[80] The residency requirement mandated that candidates applying for a position with the fire department live in the municipality; once hired, the candidates were free to live anywhere in the state.[81] Those candidates who met the residency requirement were hired in ranked order based on their combined score on physical and written examinations.[82] North Hudson's population was 3.4% black, yet the fire department employed only two blacks, which constituted 0.62% of the fire department's employees.[83] The NAACP and several black candidates brought suit alleging that the residency requirement caused the disparate impact on the black applicants.[84]

The district court initially granted the plaintiffs' request for a preliminary injunction, but while the appeal to the Third Circuit was pending, the Supreme Court decided *Ricci*.[85] Six Hispanic firefighters were subsequently permitted to intervene with a potential disparate treatment claim if North Hudson decided to eliminate the residency requirement based on racial considerations.[86] The Third Circuit then remanded the case to the district court because *Ricci* involved the overlap of disparate treatment and disparate impact claims.[87]

On remand, the district court vacated its preliminary injunction, and both parties moved for summary judgment.[88] The court granted the plaintiffs' motion for summary judgment because the plaintiffs' expert offered statistical evidence sufficient to prove a prima facie case of disparate impact, and North Hud-

80. *See North Hudson*, 665 F.3d at 468-69 (establishing facts giving rise to suit and history of residency requirements). In 1977, the U.S. Department of Justice sued several New Jersey municipalities alleging racial discrimination. *See id.* (explaining that part of settlement required those municipalities to impose residency requirements).

81. *See id.* at 469 (reporting details of residency requirement). After becoming a member of the fire department, some firefighters would live as far as sixty miles away. *See id.* (providing information on where firefighters lived in relation to town).

82. *See id.* (discussing hiring procedure).

83. *See id.* at 469-70 (noting racial disparity between general black population and black employment in fire department). The fire department employed 302 firefighters, of which 240 were white, 58 were Hispanic, and 2 were black. *See id.* at 470 (presenting racial demographics of fire department).

84. *See id.* at 470 (stating plaintiffs' theory of liability).

85. *See id.* at 470-71 (detailing procedural history).

86. *See id.* (explaining that white and Hispanic firefighters threatened suit under disparate treatment theory if residency requirement were removed on account of race).

87. *See id.* (discussing impact of *Ricci*'s holding on case).

88. *See id.* at 471 (noting elimination of preliminary injunction). The plaintiffs sought judgment on their disparate impact claim and a permanent injunction barring use of the residency requirement. *See id.* (laying out plaintiff's arguments). North Hudson argued that the plaintiffs did not prove a causal connection between the residency requirement and the statistical disparity, contended that it had established a valid business necessity defense, and asserted that *Ricci* provided a separate defense. *See id.* (stating North Hudson's defenses).

son failed to establish a business necessity defense.[89] Furthermore, *Ricci* did not provide North Hudson with an independent defense because the removal of the residency requirement was in response to a court order and therefore not motivated solely by race.[90]

The Third Circuit began by determining whether the plaintiffs demonstrated that the application of a facially neutral standard caused a significantly discriminatory effect on hiring and whether the challenged hiring practice was identified as the cause of the disparity.[91] Relying on *Harrison*, the Third Circuit explained that a black representation among North Hudson's firefighters of only 0.62% was low enough to suggest discrimination.[92] The plaintiffs' expert presented evidence that raised an inference of causation by showing the statistical disparities between the percentage of blacks employed in protective service positions in the surrounding community, 37.4%, and the percentage of blacks employed by North Hudson as firefighters, 0.62%.[93] The Third Circuit found *Bayonne* inapposite because the hiring of only two black firefighters during the ten years that the residency requirement was in place implied a causal connection between the requirement and the disparity.[94]

Having concluded that the plaintiffs satisfied the first prong, the court proceeded to analyze North Hudson's business necessity defense.[95] North Hudson needed to demonstrate that the residency requirement defined a minimum qualification for successful job performance and provide reasons for why the qualification was necessary to being a firefighter in North Hudson.[96] North Hudson

89. *See id.* at 470-75 (providing district court's rationale). The court explained that the plaintiffs' expert showed both a statistical disparity and a causal link to North Hudson's residency requirement. *See id.* at 472-75 (classifying disparity as "striking"). North Hudson proffered familiarity with the local geography, swift response times, and the need for a bilingual firefighting force as business necessities for imposing the residency requirement. *See id.* The court rejected each of these because living in North Hudson was not a "mandatory minimum requirement" and because there were less discriminatory means to achieve these goals. *See id.*

90. *See id.* at 475 (indicating that elimination of residency requirement did not present North Hudson with independent *Ricci* defense because court ordered removal).

91. *See id.* at 476-81 (explaining burden of proof that plaintiff must meet to sustain disparate impact claim).

92. *See id.* at 479 (comparing extremely low number of blacks among workforce to number in *Harrison* and concluding that disparity was sufficient to establish causation).

93. *See id.* (noting stark racial disparity). The plaintiffs' statistics regarding similar jobs in the surrounding area suggested that North Hudson should employ sixty-five blacks in comparison to the two it actually employed. *See id.* (detailing significant disparity in number of firefighters employed by North Hudson when compared to relevant labor market); *see also Disparate Impact Cases*, *in* [3 Analysis of Federal Law] Empl. Discrimination Coordinator (West) § 136:46 (2012) (affirming comparison between number of protected class members in workforce at issue and number of protected class members in relevant labor market as means of establishing disparate impact claim).

94. *See North Hudson*, 665 F.3d at 479 (explaining that, unlike *Bayonne*, magnitude of statistical disparity here established causal connection).

95. For a discussion of the requirements for the business necessity defense and an explanation of why North Hudson failed to meet the standard, see *infra* notes 96-99 and accompanying text.

96. *See* Lanning v. Se. Pa. Transp. Auth., 181 F.3d 478, 487 (3d Cir. 1999) (specifying requirements to establish business necessity defense); NAACP v. Town of Harrison, 940 F.2d 792, 797-800 (3d Cir. 1991) (same).

argued that the residency requirement was essential to the fire department's operation because it increased the likelihood of a rapid response time due to the firefighters' familiarity with the area, increased the number of Spanish-speaking firefighters in an area heavily populated by Hispanics, and fostered community pride.[97] The Third Circuit found each of these reasons to be insufficient.[98] Because North Hudson failed to establish a business necessity defense, there was no need for the plaintiffs to prove a less discriminatory alternative.[99]

The Third Circuit factually distinguished *Ricci* and declined to extend its defense to this case.[100] In *Ricci*, New Haven refused to certify the test results—giving rise to a disparate treatment lawsuit by the white and Hispanic firefighters—out of concern that certifying the exam would result in a disparate impact claim by black firefighters.[101] In comparison, North Hudson utilized a residency requirement—causing a disparate impact claim by black firefighters—allegedly because the city wanted to avoid a disparate treatment claim brought by white and Hispanic firefighters.[102] North Hudson argued that this distinction was unimportant because the *merits* of both competing claims must be weighed under the strong basis in evidence standard, thereby making which claim came *first* irrelevant to the outcome.[103]

The court found this argument unpersuasive and declined North Hudson's invitation to apply the *Ricci* defense outside of the particular factual scenario of that case.[104] In *Ricci*, New Haven had to choose between two irreconcilable

97. *See North Hudson*, 665 F.3d at 481-82 (listing city's reasoning for why residency requirement was justified as business necessity).

98. *See id.* (scrutinizing North Hudson's justifications for its residency requirement). The court acknowledged that familiarity with the area would surely increase the fire department's ability to respond quickly to emergencies, but reasoned that this justification was undermined by North Hudson's decision not to require its firefighters to live in North Hudson after they are hired. *See id.* at 482. Moreover, employing Spanish-speaking firefighters in a region that is more than sixty percent Hispanic is a plausible justification, but North Hudson failed to prove that the residency requirement actually increased the number of Spanish-speaking firefighters. *See id.* Finally, as explained in *Harrison*, the court noted that community pride cannot justify a discriminatory hiring practice. *See id.* (rejecting community pride as justification for hiring discrimination); *see also Harrison*, 940 F.2d at 804 (same).

99. *See North Hudson*, 665 F.3d at 482 (noting that defendants failed to rebut prima facie disparate impact claim).

100. For a discussion of the Third Circuit's reason for distinguishing *Ricci* and finding that its defense was inapplicable, see *infra* notes 101-09 and accompanying text.

101. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (detailing facts that led to lawsuit).

102. *See North Hudson*, 665 F.3d at 482-83 (explaining that, as in *Briscoe*, "North Hudson seeks to establish a [*Ricci*] defense in the converse situation" of that presented in *Ricci*); *see also* Brief for Appellant, *supra* note 79, at 3-4 (citing disparate treatment liability as reason for not removing residency requirement).

103. *See Ricci*, 129 S. Ct. at 2681 (explaining that holding in *Ricci* clarified competing expectations between disparate treatment and disparate impact claims); *see also* Brief for Appellant, *supra* note 79, at 3-4 (asserting that whether disparate impact or disparate treatment claim arose first is of "no legal significance in the application of *Ricci*"). According to North Hudson, if the merits are analyzed under the strong basis in evidence standard when competing claims are brought, then the merits of the independent claims, not the temporal order of filing, should determine the case. *See id.* (explaining North Hudson's argument).

104. For a discussion of why the Third Circuit rejected North Hudson's contention that *Ricci* was applicable in this case, see *infra* notes 105-09 and accompanying text.

alleged errors prior to receiving any judicial guidance.[105] Conversely, North Hudson's only action was its use of a residency requirement that caused a disparate impact; it had not yet taken steps to remedy the discrimination caused by the residency requirement.[106] Therefore, North Hudson faced only a disparate impact claim and not competing claims as was the case in *Ricci*.[107]

Additionally, because the Third Circuit, as opposed to North Hudson, would be responsible for removing the residency requirement, North Hudson did not have a strong basis in evidence for fearing a lawsuit from Hispanic firefighters under a disparate treatment theory.[108] The court also found that obtaining a workforce with a higher skill set would provide North Hudson with a legitimate reason for eliminating the residency requirement and hiring from a broader applicant pool.[109]

IV. *NORTH HUDSON*'S ALTERATIONS TO THE EMPLOYMENT DISCRIMINATION LANDSCAPE

The *North Hudson* decision offers two important insights to practitioners litigating Title VII employment discrimination cases in the Third Circuit.[110] First, *North Hudson* suggests that the use of the *Ricci* defense will be extremely limited for defendants attempting to defeat a Title VII employment discrimination claim.[111] Second, the ruling calls into question the validity of any residency requirement in municipal hiring.[112]

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105. *See North Hudson*, 665 F.3d at 484 (explaining that New Haven already administered purportedly illegal exam and subsequently attempted to fix problem by denying promotion to white and Hispanic firefighters). The initial and remedial actions undertaken by New Haven created the potential for disparate impact and disparate treatment liability, respectively. *See id.* (clarifying reasoning offered by court).

106. *See id.* (noting that North Hudson did not take any steps to remove its residency requirement or adjust its policies to minimize alleged adverse effect). Thus, North Hudson was able to secure judicial guidance before being forced to take remedial measures that could have resulted in competing claims. *See id.* (drawing factual distinction).

107. *See id.* (classifying case as "classic disparate-impact claim, one that we have resolved based on the three-step inquiry dictated by the statute").

108. *See id.* at 484-85 (supporting factual distinction of *Ricci*); *see also Ricci*, 129 S. Ct. at 2681 (emphasizing that fear of litigation is insufficient to justify another form of discrimination); Wolfe v. City of Pittsburgh, 140 F.3d 236, 240 (3d Cir. 1998) (recognizing that government employer's compliance with judicial mandate does not constitute official policy or employment practice of employer as required for liability under Title VII's disparate treatment claim).

109. *See North Hudson*, 665 F.3d at 485 (citing retaining of higher ranked non-resident applicants who possess superior merit as legitimate reason for removing residency requirement).

110. For a discussion of the insights that *North Hudson* can provide for practitioners, see *infra* notes 113-40 and accompanying text.

111. For a discussion of the Third Circuit's narrowing of the *Ricci* defense's scope, see *infra* notes 113-28 and accompanying text.

112. For a discussion of how *North Hudson* effectively invalidates residency requirements in the municipal hiring process, see *infra* notes 129-40 and accompanying text.

A. *Walking a Thin Line: The Third Circuit Narrows the* Ricci *Defense*

The Third Circuit adopted a very narrow interpretation of *Ricci* that is consistent with prior precedent.[113] Perhaps this should come as no surprise given the prevailing scholarly criticism and strong dissenting opinion in *Ricci*.[114] Moreover, the narrow interpretation follows the Second Circuit's decision in *Briscoe*, which limited *Ricci*'s application to its specific facts.[115] As in *Briscoe*, the Third Circuit held that the *Ricci* defense did not apply to the reverse factual scenario in *North Hudson*; thus, it did not provide a defense that would permit the city to continue using the residency requirement that had caused a disparate impact.[116]

North Hudson's holding provides strategic advice regarding *Ricci*'s applicability for employment discrimination attorneys litigating Title VII cases in the Third Circuit.[117] Practitioners defending municipalities should not rely on *Ricci* to provide a defense when presented with facts similar to *North Hudson*.[118] The *Ricci* decision could also be interpreted, however, in a way that limits its application to actions causing disparate treatment claims—essentially restricting *Ricci*'s holding even when applied to its own factual scenario.[119] The Third Circuit observed that the municipality in *Ricci* was forced to choose between irreconcilable alleged errors because it issued the exam and subsequently refused to certify the results.[120] North Hudson was not in a similar situation, the Third Circuit explained, because its only action was using a residency requirement which was shown to cause a disparate impact.[121] This distinction demonstrates that the timing of the lawsuit in relation to a municipal-

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113. For a further discussion of the Third Circuit's *Ricci* analysis, see *infra* notes 114-23 and accompanying text.

114. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2690 (2009) (Ginsburg, J., dissenting) ("By order of this Court, New Haven . . . must today be served—as it was in the days of undisguised discrimination—by a fire department in which members of racial and ethnic minorities are rarely seen in command positions."); *see also* Mark S. Brodin, Ricci v. DeStefano*: The New Haven Firefighters Case & the Triumph of White Privilege*, 20 S. CAL. REV. L. & SOC. JUST. 161 (2011) (offering strong criticism of *Ricci* decision).

115. *See* Briscoe v. City of New Haven, 654 F.3d 200, 208 (2d Cir. 2011) (relying on various arguments to narrow *Ricci*'s applicability). The Second Circuit also based its holding on logical reasoning. *See id.* (explaining logical fallacy that would result if *Ricci* defense was symmetrical and applied to both disparate treatment and disparate impact claims).

116. *See* NAACP v. North Hudson Reg'l Fire & Rescue, 665 F.3d 464, 484-85 (3d Cir. 2011) (citing *Briscoe* with approval for distinguishing facts of *Ricci* case and declining to extend strong basis in evidence standard to disparate impact claims).

117. For a further discussion of *North Hudson*'s impact on litigation strategies, see *infra* notes 118-23 and accompanying text.

118. *See North Hudson*, 665 F.3d at 483-85 (limiting reach of *Ricci* defense).

119. For a further discussion of the Third Circuit's important distinction between *Ricci* and *North Hudson*, see *infra* notes 120-23 and accompanying text.

120. *See North Hudson*, 665 F.3d at 484 (distinguishing *Ricci* from *North Hudson* based on when municipality received judicial guidance). In *Ricci*, issuing the exam that created the racially biased results provided the basis for the disparate impact claim, and refusing to certify the results based on racial considerations created potential liability for a disparate treatment claim. *See* Ricci v. DeStefano, 129 S. Ct. 2658, 2664 (2009) (reciting facts of case).

121. *See North Hudson*, 665 F.3d at 484 (noting facts of case and how it differs from *Ricci*).

ity's actions, rather than the type of suit brought first, may be an important factor in determining when the *Ricci* defense applies.[122] Therefore, plaintiffs with a potential disparate treatment action should bring suit against the municipality before it takes any remedial measures that might allow the employer to invoke the *Ricci* defense.[123]

Additionally, *North Hudson*'s holding reinforces Title VII's purpose.[124] While employers facing competing Title VII discrimination claims are in a difficult position, providing a defense for one type of discrimination because another type might be alleged later does not further the goal of eliminating race as an employment consideration.[125] The law is settled that an employer cannot discriminate against a class of minorities just because other employers are willing to hire those minorities.[126] Similarly, an employer should not be able to discriminate against blacks on the ground that there is a strong evidentiary basis that not discriminating against blacks would cause discrimination against Hispanics.[127] By resisting the implicit notion that some forms of discrimination are less detrimental to society, and therefore more acceptable, *North Hudson* supports Title VII's purpose.[128]

B. *Has the Third Circuit Evicted Residency Requirements?*

In addition to limiting the *Ricci* defense, the Third Circuit's decision in *North Hudson* suggests that residency requirements are presumptively void.[129] In *Bayonne*, the Third Circuit permitted the city to reinstate the residency requirement because the city's four-year experiment proved that the residency requirement did not cause the racial disparity.[130] This decision could have caused the Third Circuit to become more cautious and spurred the court to implement a heightened causation standard in future cases.[131] For instance, the

122. *See id.* (suggesting that case might have come out same way even if, as in *Ricci*, disparate treatment suit were brought prior to disparate impact suit).

123. *See id.* (discussing importance of lawsuit's timing in relation to actions taken by municipality). For a further discussion of the court's rejection of *Ricci*, see *supra* notes 104-09 and accompanying text.

124. For a further discussion of how the Third Circuit's decision is consistent with the goals of Title VII, see *infra* notes 125-28 and accompanying text.

125. *See North Hudson*, 665 F.3d at 485-86 (suggesting that two wrongs do not make a right in employment discrimination context and that focus must remain on rooting out identified discrimination). For a further discussion on the purpose of Title VII, see *supra* note 9 and accompanying text.

126. *See North Hudson*, 665 F.3d at 486 (stating law on employment discrimination).

127. *See id.* (explaining "inequities to one group accruing from remedies for discrimination against another group cannot forestall those remedies").

128. *See id.* (suggesting that Title VII cannot be reconciled with notion that threatening one form of discriminatory suit against employer validates contrary discriminatory practice).

129. For a further discussion on the effect *North Hudson* will likely have on municipal residency requirements, see *infra* notes 130-37 and accompanying text.

130. *See* NAACP v. City of Bayonne, 134 F.3d 113, 115 (3d Cir. 1998) (dismissing plaintiff's case for failing to prove causal connection between residency requirement and racial disparity).

131. *See* Brief for Appellant, *supra* note 79, at 20 (asserting that racial disparities are not always attributable to residency requirements, and that court should be more reluctant to remove them without strong evidence of causation).

court in *North Hudson* could have required stronger proof that the residency requirement, and not some other factor, was indeed preventing blacks from gaining employment before removing that requirement.[132]

The court rejected this approach, thus suggesting that residency requirements will not be valid until they are removed for a trial period to determine whether the minority representation increases in its absence.[133] With this in mind, municipalities in the Third Circuit should be wary of employing residency requirements in their hiring processes, and practitioners representing such entities should urge them to remove these requirements prior to being sued.[134] Nonetheless, lawyers defending residency requirements might succeed if they are able to identify other potential causes for the statistical inequality, thereby exposing the absence of a causal connection between the residency requirement and the disparity.[135] Practitioners representing plaintiffs alleging that a residency requirement has created a disparate impact have an easier path forward, especially given *North Hudson*'s dismissal of *Bayonne* as a defense.[136] These parties should emphasize the statistical disparities between the municipal employer and the relevant labor market in addition to establishing less discriminatory alternative practices that serve the employer's goals.[137]

The Third Circuit's decision to remove the residency requirement also promotes Title VII's purpose by ensuring that employers cannot prefer one race over another by drawing the boundaries of such a requirement in a way that excludes certain minorities.[138] Without the residency requirement as a barrier to applying for the job, candidates would be employed based on job qualifications

132. *See id.* (arguing there is no difference between current case and *Bayonne* where removal of residency requirement was ineffective at increasing minority representation among firefighters).

133. *See North Hudson*, 665 F.3d at 485 (striking down residency requirement after statistical comparison between percentage of blacks employed by fire department and percentage of qualified blacks in local applicant pool).

134. *See id.* at 477-78 (noting court's suspicion of residency requirements when coupled with racial disparity among workforce); *see also* NAACP v. Town of Harrison, 940 F.2d 792, 799-800 (3d Cir. 1991) (suggesting statistical disparities between white and minority employment need not be significant to invalidate residency requirement).

135. *See Bayonne*, 134 F.3d at 118 (noting that plaintiffs failed to prove causal nexus between residency requirement and low percentage of black municipal employees). The plaintiffs later admitted that the likely cause of the disparity was the New Jersey civil service examination. *See id.* at 121 (explaining that plaintiffs failed to isolate discriminatory effect of challenged practice). However, defendants in these actions face an uphill battle. *See* Brief for Appellees at 17-18, *North Hudson*, 665 F.3d 464 (No. 10-3983) (discussing difficulties faced by municipalities who have never removed their residency requirement in rebutting inference that requirement caused disparate racial impact).

136. For a further discussion of the Third Circuit's potential constraint of *Bayonne*, see *supra* notes 91-99 and accompanying text.

137. *See North Hudson*, 665 F.3d at 477-80 (highlighting extremely low minority representation in workforce and lack of alternative causes as factors in invalidating residency requirement); *Harrison*, 940 F.2d at 799-800 (same). For a further discussion of less discriminatory alternatives, see *supra* note 45 and accompanying text.

138. *See North Hudson*, 665 F.3d at 470 (noting residency requirement's impact on minority hiring); *see also Harrison*, 940 F.2d at 799-801 (detailing residency requirement's perverse effects).

rather than other factors that might be racially motivated.[139] Title VII does not force minorities to take advantage of these employment opportunities, but it does require that the opportunities not be restricted on account of race.[140]

V. "The Problem Is Far from Solved. We Still Have a Long, Long Way to Go."[141]

The Third Circuit's decision in *North Hudson* was consistent with the purpose of Title VII, the Second Circuit's holding in *Briscoe* with respect to the extent of the *Ricci* defense, and prior Third Circuit precedent on the validity of residency requirements.[142] By limiting the scope of the available defenses, the Third Circuit augmented Title VII's goal of ensuring that race will not bar applicants from employment.[143] The Third Circuit's distinction of *Ricci* on temporal grounds is especially significant because it provides plaintiffs with an alternative litigation angle to urge against the application of the *Ricci* defense, and it rejects the implicit argument that some forms of racial discrimination are more acceptable than others.[144] In addition to adhering to Title VII's goals, the court's decision in *North Hudson* not to expand the *Ricci* defense was consistent with the approach taken by the Second Circuit on this issue.[145] The Third Circuit's decision thus creates a strong precedent that the *Ricci* defense is limited to its facts and affords certainty to litigants in this area of law.[146]

Moreover, *North Hudson* confirms that the Third Circuit will conduct a scrutinizing review of residency requirements.[147] The court's decision to invalidate the residency requirement, despite the back-tracking in *Bayonne*, seals shut any possibility of a heightened causation standard.[148] With this decision, municipalities are on notice that use of residency requirements will result in le-

139. *See North Hudson*, 665 F.3d at 469 (explaining that candidates would be ranked and hired based on physical and written examinations).

140. *See* Civil Rights Act of 1964 § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (2006) (prohibiting classification of applicants in way which would deprive individual of employment opportunities); Ricci v. DeStefano, 129 S. Ct. 2658, 2674 (2009) (recognizing purpose of Title VII as requiring employment environment where race does not impose barrier to opportunity).

141. Martin Luther King, Jr., Nobel Lecture: The Quest for Peace and Justice (Dec. 11, 1964), *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/1964/king-lecture.html.

142. For a further discussion of how the Third Circuit's decision comported with prior precedent, see *supra* notes 113-40 and accompanying text.

143. For a further discussion supporting the assertion that the Third Circuit's holding was consistent with the goals and policies of Title VII, see *supra* notes 113-28 and accompanying text.

144. For a further discussion of the Third Circuit's distinction of *Ricci* based on when the city took certain actions and when the suit was brought, see *supra* notes 117-28 and accompanying text.

145. For a further discussion of how the Third Circuit's analysis was consistent with that of the Second Circuit, see *supra* notes 115-16 and accompanying text.

146. For a further discussion of the analysis employed in *North Hudson* compared to that employed in *Briscoe*, see *supra* notes 115-16 and accompanying text.

147. For a further discussion of the Third Circuit's inquiry into residency requirements, see *supra* notes 129-40 and accompanying text.

148. For a discussion of how *North Hudson* extinguishes the possibility of a heightened causation standard under *Bayonne*, see *supra* notes 133-37 and accompanying text.

gal challenges.[149] In conclusion, *North Hudson*'s constraint of the *Ricci* defense removes an arrow from the quiver of defense attorneys in employment discrimination cases and tosses significant doubt on the validity of residency requirements used in the context of public hiring.[150]

149. For a further discussion predicting the impact that *North Hudson* will have on municipalities, see *supra* notes 129-37 and accompanying text.

150. For a further discussion of *North Hudson*'s likely impact, see *supra* notes 110-40 and accompanying text.